

MEMORANDUM

To: Corbin R. Davis, Clerk of the Michigan Supreme Court
From: Ray McKoski, Circuit Judge (retired), Lake County, Illinois
Subject: Proposed Amendment of Canons 4 & 5 of the Michigan Code of Judicial Conduct
Date: February 9, 2011

Introduction

Thank you for the opportunity to comment upon the Proposed Amendments of Canon 4 and Canon 5 of the Michigan Code of Judicial Conduct. In my opinion, the proposals will clarify the rules governing a judge's participation in fund-raising activities and are fully consistent with the rationale justifying restrictions on fund-raising by judges. The basis for my opinion is briefly set forth below. I have also written an article that addresses judicial fund-raising issues. *See Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 Mich. St. L. Rev. 770 (hereinafter *Charitable Fund-Rising by Judges*).

Canon 4 Comment

The proposed amendment to Canon 4 permits judges to play featured roles, such as speaker or honoree, at a law-related organization's fund-raising event. This is the approach taken in the 2007 ABA Model Code of Judicial Conduct (2007 ABA Code). *See* 2007 ABA Code R. 3.7 (A)(4), *Reporter's Explanation of Changes* ("[A] judge is permitted to be a featured speaker or participant at an event that has a fund-raising purpose, but only if the organization or entity is a law related one."). Most states which have revised their judicial codes in light of the 2007 ABA Code have followed the ABA's lead and allow judges to be speakers and award recipients at law-related fund-raisers and also allow judges to be advertised as such in event invitations and programs. *See, e.g.*, Ariz. Code of Judicial Conduct R. 3.7 (A)(4) (2010); Ark. Code of Judicial Conduct R. 3.7 (A)(4) (2009); Colo. Code of Judicial Conduct R. 3.7 (A)(4) (2010); Wash. Code of Judicial Conduct R. 3.7 (C) (2010); Wyo. Code of Judicial Conduct R. 3.7 (A)(4) (2009). As recognized by the ABA, participation as a speaker or guest of honor in a fund-raising event does not implicate the dangers which justify limiting judicial participation in fund-raising activities. Speaking or receiving an award is not a solicitation. Nor could it be claimed that because a judge is a speaker or honoree, a prospective attendee would feel compelled to buy a ticket, or having bought a ticket, feel entitled to a return favor from the judge. *See* Mich. State Bar Comm. on Prof'l and Judicial Ethics, Op. JI-9 (1989) (permitting judge to serve as honoree at fund-raising testimonial) and JI-71 (1993) (serving as a model in a charitable fashion show is not solicitation or coercive); *see also Charitable Fund-Raising by Judges*: 2008 Mich. St. L. Rev. 770, 781-82.

In 2006, the Illinois Supreme Court amended Canon 4 of the Illinois Code of Judicial Conduct (Illinois Code) in order to clarify that judges could participate as speakers and award recipients at law-related fundraisers. Prior to the amendment judges were unsure if they could install bar association officers, speak at annual bar meetings, receive awards from law schools, or teach at bar educational seminars if the cost of admission to the event exceeded the organization's cost in producing the event. Canon 4 of the Illinois Code as amended in 2006 provides in relevant part:

[The judge] may participate in the management and investment of the [law-related] organization's funds; and may appear at, participate in, and allow his or her title to be used in connection with a fund-raising event for the organization. Under no circumstances, however, shall a judge engage in direct, personal solicitation of funds on the organization's behalf.

The amendment has helped Illinois judges distinguish between permissible and impermissible fund-raising activities on behalf of organizations related to the law, the legal system or the administration of justice. At the same time, it prevents the primary evil of judicial fund-raising—a direct solicitation by a judge. The Michigan amendment to Canon 4 will do the same.

Canon 5 Comment

The proposed amendment to Canon 5 also permits judges to participate as speakers and honorees at fund-raising events sponsored by non-law-related educational, religious, civic, charitable and fraternal groups. This is also the rule in Illinois and at least four other states. *See* Ill. S. Ct. R. 65 (2006); Cal. Code of Judicial Ethics Canon 4C(3)(d)(4) (2007); Ind. Code of Judicial Conduct R. 3.7(A)(4) (2009); Ohio Code of Judicial Conduct R. 3.7(A)(5) (2009); Tex. Code of Judicial Conduct Canon 4C(2) (2005). Taking a contrary approach, the 2007 ABA Code prohibits featured roles by judges at non-law-related fund-raisers. 2007ABA Code R. 3.7(A)(4). The ABA is simply wrong on this point. There is no justification for permitting judicial participation in fund-raising functions for law-related groups while prohibiting the same assistance for non-law related charitable, civic, educational, religious, and fraternal organizations. The rationale underlying restrictions limiting a judge's fund-raising activities does not support the distinction.

Rules restricting the fund-raising activities of judges serve two purposes: (1) eliminating the potential for a judge to misuse the prestige of office to persuade, coerce, or convince others to make a donation and (2) avoiding the possibility that a donor will expect favorable treatment from a judge in return for a contribution. *See Charitable Fund-Raising by Judges*, 2008 Mich. St. L. Rev. 770, 819; *In re Davis*, 946 P.2d 1033, 1045 (Nev. 1997) (“The [fund-raising] rule addresses the dual fears that potential donors may either may be intimidated into making contributions when solicited by a judge, or that they may expect future favors in return for their largesse.”) (quoting JEFFREY M. SHAMAN, ET. AL., JUDICIAL CONDUCT AND ETHICS §9.06, at 289 (2nd ed. 1995)); *In re Hartman*, 873 A.2d 867, 871-72 (Pa. Ct. Jud. Disc. 2005) (same); ABA ANNOTATED CODE OF JUDICIAL CONDUCT 280 (2004) (“[Fund-raising] limitations address two concerns: that the person solicited will feel obligated to respond favorably because of the judge's position of influence or control or will expect future favors for their donation.”).

The interests protected by fund-raising limitations are most likely to arise where a judge makes a personal solicitation especially where the target of the solicitation has, or is likely to, appear before the judge as a litigant or lawyer. The rationale for fund-raising restrictions is much less likely to be implicated when a judge makes no solicitation but merely speaks or receives an award at a fund-raising event. It is simply not reasonable to presume that an individual will feel compelled to attend an event at which a judge is featured, or that an attendee will feel entitled to a judicial favor in return for purchasing a ticket. But even assuming that featured roles by judges somehow indirectly misuse judicial prestige to influence a potential donor, this indirect

“pressure” is much more likely to arise at law-related events rather than civic, charitable, religious, educational, and fraternal events. This is true because the seats at bar association and other law-related gatherings are filled mostly by lawyers who may very well have business before the judge. On the other hand, the vast majority of people at events sponsored by a church, college, or other charitable group, have no reason to be cajoled into attending an event by a judge’s participation because they will never appear before the judge. *See Charitable Fund-Raising by Judges*, 2008 Mich. St. L. Rev. 770, 816-20; Roger J. Miner, *Judicial Ethics in the Twenty–First Century: Tracing the Trends*, 32 Hofstra L. Rev. 1107, 1128 (2004) (agreeing that a non-lawyer is less likely to feel pressured by a judge’s solicitation); JAMES J. ALFINI, ET AL., JUDICIAL CONDUCT AND ETHICS, §9.04A, at 9-16 (4th ed. 2007) (“While it is certainly accurate to say that lawyers . . . can be intimidated into contribution by the solicitation of sitting judges, it seems less likely that average citizens would feel equally compelled . . .”). Simply put, if there is no reason to prohibit judges from participating in attorney-targeted, law-related fund-raisers, there is even less reason to prohibit participation in other charitable fund-raisers. Thus, the proposed amendment to Canon 5 of the Michigan Code is fully justified.

In 2006, the Illinois Supreme Court amended Canon 5 of the Illinois Code to expressly *allow* judge to serve as speakers and guest of honor at non-law related fund-raisers. *See Ill. S. Ct. R. 65 (B)(2)* (2006). Before the amendment, Canon 5 specifically *prohibited* judges from such roles. The change has benefited the public image of judges and has resulted in no public perception of the misuse of judicial prestige.

Canon 4 and 5 Comment

Both proposed amendments include the following sentence: “To the extent practicable, a judge must be shielded from the identity of contributors and the amount of their contributions.” Applying this restriction may be problematic. In the context of judges as speakers and award recipients, the provision could be interpreted to preclude a judge (1) from being present during a “live” auction part of an event; (2) bidding on silent auction items or being present when the high bidders are announced; (3) reviewing the event program, ads, or invitations which usually list the “sponsors” of the event; and (4) reviewing any “fund-raising journal” or “ad book” produced as part of the event. (For an example of an ad book see the 20th Annual Margaret Brent Awards Luncheon Commemorative Program and Tribute Book, *available at* <http://www.abanet.org/women/margaretbrent/10/BrentTributeBook2010.pdf>.). Additionally, a judge will necessarily know the identity of the contributors at any event the judge attends. It is suggested that the provision is unhelpful and unnecessary.

Thank you for allowing an interloper from Illinois to comment on the proposed amendments.

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